NO. 81332-9

SUPREME COURT OF THE STATE OF WASHINGTON

RESIDENTS OPPOSED TO KITTITAS TURBINES and F. STEVEN LATHROP, et al.,

Petitioners,

v.

STATE ENERGY FACILITY SITE EVALUATION COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the State of Washington, et al.,

Respondents.

BRIEF OF RESPONDENT SAGEBRUSH POWER PARTNERS LLC

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I. INTRODUCTION

This case involves the Governor's approval of a Site Certification Agreement for the Kittitas Valley Wind Power Project (the "KVWPP" or the "Project"). The Energy Facility Site Evaluation Council ("EFSEC"), charged with making a recommendation to the Governor on the siting of energy facilities under RCW 80.50, found the KVWPP "is expected to produce minimal adverse impacts on the environment, the ecology of the land and its wildlife, and the ecology of the state's waters and their aquatic life" and "will provide the region with significant energy benefits." Council Order No. 826 ("Order 826"), Administrative Record ("AR") 14257-14332, at AR 14258. Providing these energy benefits through wind power promotes air cleanliness and helps to meet increasing demand from utility customers for renewable energy.

This approval followed extensive public hearings and adjudicative proceedings, thorough environmental review, and unprecedented property-by-property assessment of visual impacts. Significant project modifications were made to meet concerns, including reducing the project from a proposed 150 wind turbines to a maximum of 65 wind turbines. However, Petitioners contend that turbine setback and micro-siting requirements do not go far enough to address visual impacts on 16 properties, most of which have views oriented away from the turbines or have the turbines blocked from view by topography or vegetation.

Although the Petitioners focus on the visual impacts of a limited number of specific property owners, they bring a very broad challenge to

the EFSEC siting process. Despite the legislature's express preemption of local land use controls, Petitioners seek local power to reject the state's siting of energy facilities. They argue the Growth Management Act (the "GMA") impliedly repealed the preemption provisions of RCW 80.50 without any reference thereto. Alternatively, they argue statutory definitions in RCW 80.50 preclude state control over siting of "alternative energy facilities," applying an illogical analysis that ignores statutory language and legislative intent. Petitioners further seek to subvert the legislative intent by taking advantage of a former EFSEC rule that went beyond the statute and required a good-faith attempt to resolve noncompliance with local land use plans or zoning ordinances. Kittitas County adopted a Wind Farm Resource Overlay Ordinance and implemented it in a way that would preempt the state siting process with a local siting process. Finally, Petitioners dispute the legality of the procedures the legislature established for siting decisions and judicial review.

Contrary to Petitioners' contentions, straightforward application of the law and substantial evidence fully support EFSEC's recommendation and the Governor's approval of the KVWPP and the Site Certification Agreement. The applicant, Sagebrush Power Partners ("Sagebrush"), fully followed the terms and the spirit of the law and EFSEC's rules, including extensive good-faith attempts to resolve noncompliance issues with Kittitas County. The Site Certification Agreement approved by the Governor reflects the considered result of this extensive process. There is

no basis in law or fact for the Petitioners' contentions that errors were made.

II. STATEMENT OF THE CASE

A. Counterstatement of the Facts

1. Overview of the KVWPP and the Site Certification Agreement

The KVWPP includes a maximum of 65 wind turbine generators on either side of Highway 97 in unincorporated Kittitas County, 12 miles northwest of the city of Ellensburg. Order 826, AR 14257. Independent analysis of the meteorology indicates this is "one of the best wind power project sites available in Washington." Order 826, AR 14279. There are few environmental constraints, with no established migratory bird routes and no significant water bodies that attract wildlife. Order 826, AR 14262, 14279, 14294.

Wind turbines will be placed on ridges in the Project site. Three existing sets of high voltage power transmission lines run directly over the Project site. These include Puget Sound Energy and Bonneville Power Administration transmission lines that run from Columbia River dams to the Puget Sound area. AR 14262. The Project would interconnect to one or more of these transmission lines. The Project is anticipated to generate electricity for as many as 45,000 homes.[1] AR 9694; AR 11907.

[1] EFSEC Order No. 826 notes that the Project would generate between 100 and 180 MW of wind power, dependent on the type of turbines selected. Use of smaller turbines for all 65 units would limit power generation to 100 MW while use of the maximum turbine size would generate 180 MW of wind power. AR 14261.

The wind turbines will be located in corridors identified in the Site Certification Agreement.[2] Each wind turbine is subject to setback provisions, which vary depending on whether the landowner is participating in the project through leases.[3] For nonparticipating landowners, the minimum setback from existing residences must be four times the distance from the ground to the turbine blade tip at its apex. AR 11874. The setback distances will likely be further increased during a process known as "micro-siting." Micro-siting generally takes into account site-specific conditions such as sensitive habitat, subsurface stability , wind flows, or other factors that require leeway in the exact placement of a turbine foundation. Council Order 831, AR 14339. Under the Site Certification Agreement, micro-siting for each turbine located within 2,500 feet of a non-participating landowner's existing residence is to give priority to increasing the distance of the turbine beyond the "four times height setback" to further mitigate and minimize any visual impacts on that non-participating landowner. AR 11874. The Project will meet Washington State Environmental Noise Levels, WAC 173-60. AR 11900.

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[2] The details of the Project as approved by the Governor are specified in the Site Certification Agreement, which governs the construction and operation of the project. RCW 80.50.100. AR 11872-11874.

[3] No wind turbine will be placed within the "turbine tip height" of residences of participating landowners. Any turbine must be placed 541 feet from a property line. AR 11874.

No more than 16 houses are within 2,500 feet of proposed turbines. AR 12515-12517, Order 826, AR 14286. In many cases the turbines would not be prominently visible from the houses because they may be screened to varying degrees by intervening topography or vegetation. AR 12518. Even if not screened, many of the residences are oriented in a direction away from the ridges and turbines. For example, a number of the residences are oriented toward the northwest to capture the views of the Stuart Range, placing the turbine sites to the backs of the residences. AR 12517. The applicant's visual and aesthetics expert, Dr. Thomas Priestley, thoroughly reviewed the visual impacts on every house within 2,500 feet of one or more turbines. *See* Applicant's Prefiled Supplemental Direct Testimony: Thomas Priestley, Sagebrush Power Partners' Appendix of Record ("Sagebrush Appendix"), Exhibit A, AR 12513. His site-specific analysis of these residences found that turbines would be in the primary viewshed of three of the 16 residences, which he summarized as follows:

> Specifically, of the 16 residences referred to above, views from one of the residences towards turbines within 2,500 feet would be completely screened by the intervening topography. From five additional residences, views towards turbines located within 2,500 feet would be substantially screened by topography and vegetation. In the case of seven of the 16 residences, the turbines that would be sited within 2,500 feet would not be located within the residence's primary viewshed. In views from three of the residences, some of the turbines that would be sited within 2,500 feet would be located outside of the primary viewshed of the residence, while others would be located within it.

AR 12518. For wind turbines in the primary viewshed, Dr. Priestley stated his opinion that "[a] 1/4 mile setback should be adequate to mitigate against any potential affect of a turbine visually dominating the view." *Id.*

Other visual aspects of the Project are also addressed in the Site Certification Agreement. Lighting will be minimized to that necessary for security and safety.[4] Measures are required to address "shadow flicker" that may occur when the sun is low and shines through blades of a turning wind turbine.[5] A nonparticipating owner of an existing residence within 2,500 feet and with a line-of-sight view of a turbine who experiences shadow flicker may request the turbine be shut down for the duration of the impact. AR 11902. Sagebrush is able to program the wind turbines to shut down during the specific times that significant shadow flicker occurs. Order 826, AR 14288.

2. Overview of EFSEC Structure and Authority

Approval of the Site Certification Agreement was recommended in a 6 – 1 vote by EFSEC, a council that includes representatives from state agencies and local governments as specified in RCW 80.50.030. The EFSEC Chair is appointed by the Governor. Council membership is

[4] Approximately 18 turbines will be marked with red night time flashing warning lights required by the FAA to alert aircraft to their presence. AR 11896

[5] This shadow flicker might occur a few hours during the year near sunrise or sunset when there is no cloud cover and the shadows are long, if the wind turbines are turning at a certain orientation in sight line view of the property. AR 11902.

mandatory for five agency heads or their designees.[6] The county in which a proposed project would be located also appoints a member or designee as a voting member of EFSEC.

EFSEC is often described as a "one stop" siting and licensing authority for large energy projects. Additionally, developers of energy facilities that exclusively use alternative energy resources, regardless of the size of the facility's generation capacity, may decide to apply through the EFSEC process to site the facility. Once an application is submitted, steps in the EFSEC siting process include review under the State Environmental Policy Act ("SEPA"), local land use consistency hearings and proceedings, and coordinated public hearings and adjudicative proceedings on all issues related to the project.[7] EFSEC prepares a report and recommendation to the Governor, including a draft site certification agreement if one is recommended. The Governor then decides whether to approve the application and execute the draft site certification agreement, reject the application, or remand with directions to EFSEC to reconsider certain aspects of the draft certification agreement.[8]

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[6] Membership is discretionary for four other departments of state government; none participated in this proceeding. RCW 80.50.030(3)(b).

[7] WAC 197-11-938(1); WAC 463-14-080; WAC 463-26; RCW 80.50.090.

[8] RCW 80.50.100.

3. Environmental Review Pursuant to SEPA

EFSEC is the lead agency for environmental review of projects under the jurisdiction of RCW 80.50. WAC 197-11-938(1). The SEPA review for this Project involved scoping meetings with federal and state agencies, a separate public comment meeting on the scope of the Environmental Impact Statement ("EIS"), six public hearings, and opportunities at each step of the process to submit written comments.

4. EFSEC Land Use Consistency Proceedings Pursuant to RCW 80.50.090

As required by RCW 80.50.090, EFSEC held a hearing to determine if the proposed Project site was consistent with Kittitas County land use plans and zoning ordinances. AR 14266. It was a foregone conclusion that it would not be, since the County had recently adopted a Wind Farm Resource Overlay Ordinance that had no designated wind farm areas. Former Kittitas County Code, Ch. 17.61A; Sagebrush Appendix, Exhibit B; AR 12949-12951. Rather, the county provided a four-step siting process, with each step requiring Board of County Commissioners' ("BOCC") approval. These steps included:
(1) amendment of the Comprehensive Plan Land Use map to designate a wind farm resource district, (2) a site-specific rezone to create a wind farm resource "zone", (3) execution of a development agreement, and
(4) issuance of development permit. *Id.*

Although EFSEC recognized that state law preempted local law under RCW 80.50.110(2), it had promulgated a rule that required a project

proponent to seek local land use changes or approvals as a condition to continued processing of the EFSEC application. *See* former WAC 463-28-030 (requiring "all reasonable efforts to resolve the noncompliance"). Sagebrush filed an application with Kittitas County seeking to comply with the Wind Farm Resource Overlay Ordinance. The EFSEC rule provided for a stay of the EFSEC Application Proceeding while the applicant attempted to resolve noncompliance issues. WAC 463-28-030(2).

a. Attempts to resolve land use consistency issues with Kittitas County

Sagebrush made two separate attempts to achieve land use consistency in Kittitas County. The second effort involved a five-month process detailed at Order 826, AR 14274-14277. The second application had already reduced the Project size from 150 to 80 wind turbines. AR 11941. During the course of hearings before the county, Sagebrush further reduced the Project to a maximum of 65 wind turbines with a concomitant reduction in the potential electrical power generation. AR 11950. Sagebrush also increased the setbacks from existing residences from 1,000 feet to 1,320 feet. AR 11958. Sagebrush suggested operational controls that could be used if adjacent landowners experienced significant shadow flicker impacts. AR 8278.

Each of the three county commissioners had a different view on what setbacks should be, ranging from a minimum of 2,000 feet from nonparticipating property lines and 2,500 feet from non-participating

landowners' residences, to a one-half mile (2,640 feet), to a setback up to 3,000 feet. Order 826, AR 14276. Sagebrush pointed out how few wind turbines could be sited under any of these proposed setbacks, even to the point of making the Project economically unviable. AR 16248-16251. Commissioners demanded proprietary financial information to "prove" Sagebrush's stated position regarding project viability. AR 12032-12034. Sagebrush was concerned about the implications of public disclosure of such proprietary business information. AR 12085-12086. Sagebrush argued that this request was totally unprecedented, beyond the scope of land use regulation, and contrary to the legislative purpose of providing "abundant energy at reasonable cost." AR 12035-12039. Over the next month, Sagebrush continued discussions and correspondence with County staff, and examined whether the various setbacks demanded by each Commissioner could be implemented. AR 8192-8198; 6629-6640. Determining that the already reduced Project could not be further reduced to accommodate these demands, Sagebrush requested that the BOCC make a decision on whether to approve the Project. AR 8224-8226. The BOCC then adopted Kittitas County Resolution No. 2006-90, denying the comprehensive plan amendment, rezone, development agreement and permit–the four elements required by the Wind Farm Resource Overlay Ordinance. AR 9166-9177. Without setting out what setbacks would be required, the Resolution stated the setbacks proposed by Sagebrush would not be adequate and suggested a minimum setback of 2,500 feet from residences. AR 9176.

b. Request for Preemption

Former WAC 463-28-040 required the applicant to "file a written request for state preemption" if efforts to resolve local noncompliance issues were not successful. Sagebrush filed "Applicant's Second Request for Preemption." AR 6585-6613. As required by the rule, this Request (1) documented Sagebrush's extensive good faith efforts to obtain land use and zoning changes and permission required under the Kittitas County ordinance, (2) reported these efforts were ultimately unsuccessful, (3) reported there was no alternate site within the county that could be identified as acceptable under the county ordinance, and (4) addressed the interests of the state. *Id.*

5. EFSEC Recommends the Exercise of State Preemption and Approval of a Site Certification Agreement

EFSEC held a four day adjudicative proceeding on Sagebrush's Application in Ellensburg. AR 14266. Public hearings were held in Seattle and Ellensburg. *Id.* EFSEC reviewed the five-month chronology of the attempt to resolve local land use inconsistencies. AR 14273-14278. Its Order noted the compromises in the scope and scale of the proposed project, found Sagebrush had suggested measures to mitigate the potential impacts of shadow flicker, and found there were significant good faith efforts to navigate the county's permitting process and resolve noncompliance issues. AR 14277. After considering the evidence, EFSEC recommended the Governor exercise state preemption and approve the site certification agreement. Order 826, AR 14284-14285.

6. After Remand, the Governor Approves an Amended Site Certification Agreement Requiring Micro-Siting with Further Consideration of Visual Impacts

The Governor remanded the recommended Site Certification Agreement to EFSEC to reconsider whether additional setbacks could be achieved while allowing the Project to remain economically viable. AR 11390-11391. EFSEC held a public meeting and offered an opportunity for comment. AR 11392-11393. After reviewing this input and its statutory authority, EFSEC concluded it had no authority to adjudicate issues related to economic viability, and that while the state interests delineated in the statute may require conditions on a project, "only the Applicant can determine when a reduction in the number of turbines permitted will prevent construction of the Project." AR 11339. EFSEC considered the purpose behind the remand and determined further setbacks developed during the micro-siting process would best address any lingering concerns about visual impacts. AR 11337-11340. EFSEC recommended an amended draft Site Certification Agreement. AR 11341-11342. The Governor approved the Project and signed the Site Certification Agreement on September 18, 2007. AR 11906.

B. Procedural History

1. Proceedings in Thurston County Superior Court

Petitions for Judicial Review were filed by Kittitas County and by Residents Opposed to Kittitas Turbines ("ROKT") and F. Steven Lathrop.

Members of ROKT are owners of property adjacent to the Project.[9] Mr. Lathrop is a resident of the Kittitas Valley and owns property 6-7 miles from the Project site. AR 15857. The Superior Court consolidated the petitions into a single proceeding pursuant to RCW 80.50.140.

The Superior Court allowed the certified record to be supplemented with declarations and depositions on alleged irregularities in procedure. Supplemental Record ("SR") 489-490. Kittitas County alleged that emails obtained through public disclosure requests raised questions about the integrity of the "screening" procedures put in place to protect against ex parte contacts by agency parties with EFSEC members who were agency designees. SR 321. The County also claimed that emails showed "concern for the self-preservation of EFSEC and bias against the County" by EFSEC Chair James Luce and Department of Fish and Wildlife designee Chris Smith-Towne. SR 323. The Superior Court authorized limited discovery on these allegations, allowing the depositions of Mr. Luce and Ms. Smith-Towne. SR 1154. The Superior Court reserved the question of whether an evidentiary hearing would be appropriate until after this discovery was complete. *Id.*, SR 1235.

The uncontroverted deposition testimony and declarations were reviewed by the Superior Court. SR 500. The deposition testimony of

[9] ROKT's motion to intervene in the EFSEC proceedings listed five members and their addresses. Two members listed addresses in Cle Elum or Ellensburg, and the others listed Puget Sound area addresses. AR 2306.

Ms. Smith-Towne demonstrated that EFSEC and state agencies adhered to the "wall" of separation that screened agencies parties from decision makers. SR 652-653. The depositions of both Mr. Luce and Ms. Smith-Towne addressed their deliberative, nonpublic statements that if the facts of this case did not call for state preemption, there would never be circumstances in which EFSEC would preempt. SR 693-695, 631-632. Both indicated they were stating their commitment to follow the law as enacted by the legislature. *Id.* The declaration of Darrel Peeples, counsel for Sagebrush, confirmed that he did not have any ex parte conversations with Mr. Luce concerning the Project. SR 878-882. After reviewing these materials and determining there were no disputed factual issues, the Superior Court found "[t]he alleged irregularities in procedure asserted by Petitioners are insufficient to meet the requirements and standards of RCW 80.50.140 and RCW 34.05.562 . . . ." SR 489. The Superior Court then entered an "Order Certifying Petitions for Review to Supreme Court for Direct Review" finding review of the record can be limited to the administrative record of EFSEC; that fundamental and urgent interests affecting the public interest and development of energy facilities are involved in these proceedings, which require a prompt determination; that review by the Supreme Court would likely be sought regardless of the determination of the Thurston County Superior Court; and that with the supplementation of the record with certain declarations and deposition testimony, the record is complete for review. SR 486-494.

2. Proceedings in Supreme Court

The Respondents moved this Court for expedited review pursuant to RCW 80.50.140. The parties were directed to address the question of whether the Supreme Court has authority to decide this case. The Petitioners filed a notice of appeal to the Court of Appeals, which has been transferred to the Supreme Court and consolidated with this matter.

III. ARGUMENT

A. The Supreme Court Has the Authority to Decide This Case

1. Supreme Court Review Under RCW 80.50.140 Is the Exercise of Appellate Jurisdiction Identical in Substance to Appellate Review in Other APA Cases

Article IV, section 4 of the Washington Constitution provides in relevant part: "The supreme court shall have . . . appellate jurisdiction in all actions and proceedings. . . ." Supreme Court review under RCW 80.50.140, after the Superior Court has determined the factual record is complete, is the exercise of appellate rather than original jurisdiction. Although this Court has never examined a statute like RCW 80.50.140, it has considered the nature of the individual components of judicial power set forth in that statute. Careful examination of these elements shows this statute is structured to ensure that matters of original jurisdiction are exercised by the superior court, with the Supreme Court performing the same appellate review it would conduct in any Administrative Procedure Act (APA) appeal.

A petition for review of a final site certification decision must be filed in Thurston County Superior Court. Under RCW 80.50.140(1), if review cannot be limited to the administrative record, the Superior Court takes testimony and determines factual issues. That statute provides in pertinent part:

> If the court finds that review cannot be limited to the administrative record . . . because there are alleged irregularities in the procedure before the council not found in the record . . . the court shall proceed to take testimony and determine such factual issues raised by the alleged irregularities and certify the petition and its determination of such factual issues to the supreme court.

The case will be certified to the Supreme Court only when "[t]he record is complete for review." RCW 80.50.140(1)(d). Thus, the legislature recognized that an appellate court "is not a fact-finding branch of the judicial system of this state." *Berger Eng'g Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959).

Judicial review on a complete record is appellate in nature, whether conducted by a superior court or the Supreme Court. A superior court exercises "appellate jurisdiction" when it reviews an agency decision based on an administrative record. *See, e.g., Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (appeal from an administrative tribunal invokes the appellate, rather than the general, jurisdiction of the superior court). And in such agency review cases the Supreme Court "sits in the same position as the superior court and applies the APA standards directly to the agency

record." *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 776, 947 P.2d 732 (1997).

This statute is quite different from the statute vesting the Supreme Court with exclusive reviewing jurisdiction over an administrative decision at issue in *North Bend Stage Line v. Dep't of Public Works*, 170 Wash. 217, 218, 16 P.2d 206 (1932). That statute vested all reviewing jurisdiction over an administrative department "directly and exclusively in this [supreme] court." *In re Third Lake Washington Bridge*, 82 Wn.2d 280, 510 P.2d 216 (1973), noted the *North Bend* holding and cited practical reasons for trial court review, such as the need to "tak[e] proofs as to alleged irregularities in agency procedure not shown on the record." *Id.* at 286 (citing F. Cooper, 2 State Administrative Law 612 (1965)). In contrast, RCW 80.50.140 recognizes and respects the fundamental differences in fact finding and appellate functions, and provides the Supreme Court appropriate appellate jurisdiction.

2. Discretionary Jurisdiction Is Warranted Where the Legislature Has Declared a Need for Expedited Review

In the absence of mandatory jurisdiction, RCW 80.50.140 should be construed as conferring discretionary jurisdiction. This approach was applied in *In re Elliott*, 74 Wn.2d 600, 604-05, 446 P.2d 347 (1968), where a statute provided "the supreme court shall render its opinion in answer" to a certified question of state law. The statute was construed as permissive "Where a statute makes that legal and possible which

otherwise there would be no authority to do, it will be construed as permissive only, although using the word 'shall.'" *Id.* at 607 (quoting 82 C.J.S., Statutes § 380 at 881 (1953)). Exercise of the Court's discretionary powers is appropriate where an opinion of the Supreme Court would be beneficial to the public and to the other branches of the government. *See, e.g., State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972). Sagebrush urges this Court to exercise its discretionary jurisdiction when the Superior Court finds that a proceeding involves urgent public interests.

3. The Superior Court Fulfilled the Requirements of RCW 80.50.140 and Did Not Abuse Its Discretion in Ensuring the Record was Complete for Review

If the Superior Court finds that review cannot be limited to the administrative record because of alleged procedural irregularities not found in the record, RCW 80.50.140(1) provides for the Court to take testimony and determine factual issues. Here, the Petitioners did not present evidence of irregularities. Rather, at best, they speculated that several agency emails suggested such irregularities. SR 1154, 498. The Superior Court then exercised its discretion to allow the Petitioners to conduct limited discovery and take the depositions of Mr. Luce and Ms. Smith-Towne.[10] This discovery demonstrated that the KVWPP

[10] Notably, when authorizing the depositions of Mr. Luce and Ms. Smith-Towne, Judge Hicks instructed the Petitioners to return to him if, after the depositions, they felt it necessary to conduct yet more discovery. *See* Thurston County Court Order dated January 4, 2008 at SR 1154. It is unrefuted that Petitioners failed to identify additional discovery needed. *See* Sagebrush Appendix, Exhibit C hereto, *Verbatim Transcript of*

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proceedings were highly regular, and involved appropriate deliberations and decision-making by public servants who sought to follow the law. SR 631-32, 693-94, 762-63. There was no basis for further discovery, and Petitioners have failed to make any showing that the Superior Court abused its discretion. *See Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 629, 818 P.2d 1056 (1991) ("the discovery order of the trial court is reviewable *only* for an abuse of discretion").

As the Superior Court observed, this discovery did not "show any material disputed issue of fact that would require any further evidentiary hearing." SR 500. There were no differing versions of the truth for the Superior Court to resolve. Rather, the parties' dispute is about the legal consequences of the undisputed facts: whether there was a violation of the appearance of fairness doctrine or impermissible ex parte contacts.

A brief review of the discovery record confirms there were no triable issues of fact for the Superior Court to resolve. The appearance of fairness doctrine recognizes the "presumption that public officials will properly perform their duties." *Nationscapital Mortgage Corp. v. State Dep't of Fin. Inst.*, 133 Wn. App. 723, 759, 137 P.3d 78 (2006). Accordingly, "[t]o overcome the presumption, a party invoking the appearance of fairness doctrine must come forth with evidence of actual or

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Proceedings on Motions to Certify Petitions, Certify Record and Strike Testimony, at 14:19-25, 15:1-23.

potential bias." *Id.* "[M]ere speculation is not enough." *Bunko v. City of Puyallup Civil Serv. Comm'n*, 95 Wn. App. 495, 503, 975 P.2d 1055 (1999). Moreover, "[p]rejudgment and bias are . . . to be distinguished from the ideological or policy leanings of a decisionmaker." *OPAL v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).

Petitioners allege that participation by the DNR and DCTED representatives in the KVWPP proceedings violated the appearance of fairness doctrine.[11] The sworn testimony of these agency representatives attested to the existence of a "wall" separating the agency representatives from agency personnel and shielding the representatives from inappropriate influence. *See, e.g.,* AR 14111. In addition, the existence of a "wall" is supported by the depositions of Ms. Chris Smith-Towne and Mr. James Luce. SR 641-42, 698-99; Excerpts from Deposition of James O. Luce, Sagebrush Appendix, Exhibit D, SR 859-862; Excerpts from Deposition of Chris Smith-Towne, Sagebrush Appendix, Exhibit E, SR 876-877; *see also* Sagebrush Appendix, Exhibit C at 25:6-8 (Mr. Caulkins: "As to the Chinese wall between the entities, we're – I think the county will concede I'm not seeing anything there").

Nor did Petitioners produce evidence to support allegations that Mr. Luce exhibited bias and prejudgment with respect to the KVWPP.[12]

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[11] AR 14156-71, 14137-54, 14122-36, 14107-21, 14105-06.

[12] Petitioners also suggest bias by the DNR Council member because DNR (in its capacity as trustee for the school fund) would receive revenues by leasing land for the KVWPP. The prospect of payments that constitute a minute fraction of an agency

(continued . . .)

Rather, Petitioners focused on his internal deliberative expressions of opinion regarding the state's unambiguous statutory authority to preempt and the policy necessity for such authority. Such statements do not constitute bias or prejudgment, particularly given Mr. Luce's statement that an adjudicative process was necessary before any conclusions on the application were reached,[13] a process that would "test" the legal positions of the parties. SR 282.

Mr. Luce and Ms. Smith-Towne's depositions laid any questions to rest. SR 855-77. For example, when asked whether EFSEC's credibility was the "driving force" behind EFSEC's recommendation to preempt, Mr. Luce explained:

> I am sworn as an officer of the State of Washington to carry out the statutes of the State of Washington, and that was certainly a driving force. I would have been derelict in my duties had I not felt that way and had I not recommended preemption. In fact, I would say I would be acting ultra vires, to use a different term of law.
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> SR 694-95.

Additionally, Petitioners alleged that Mr. Luce engaged in ex parte communications with various individuals, but the undisputed evidence

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budget, where the government official does not stand to personally profit, does not show bias. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980) (finding no "realistic possibility" that the judgment of the agency administrators would be distorted by the prospect of institutional gain since civil penalties collected under the statute represented less than 1% of the budget of the agency).

[13] *See* Sagebrush Appendix, Exhibit D, *Excerpts of the Deposition of James O. Luce*, at 8, SR 862.

showed the conversations did not relate to the pending application. SR 684-685, 687, 707-708, 752-753. *See OPAL*, 128 Wn.2d at 887 (noting that burden is on appellant to prove impropriety in communications between decision makers and parties to administrative proceeding).

After reviewing the deposition testimony, the Superior Court found that there "was no material disputed issue of fact that would require any further evidentiary hearing."[14] Petitioners fail to come forth with *any* evidence of procedural irregularity sufficient to demonstrate that the Superior Court abused its discretion under RCW 80.50.140. If the Superior Court were indeed obligated—as Petitioners have suggested—to take evidence and make factual findings any time a party *alleges* irregularity in procedure,[15] a party could indefinitely forestall Supreme Court review by merely setting forth unfounded allegations of irregularity. The Superior Court fulfilled its requirements under RCW 80.50.140 and did not abuse its discretion in ensuring a complete record for review.

B. The Legislature Preempts County Authority When an Alternative Energy Facility Seeks Site Certification

As clearly stated in Article XI, section 11 of the Washington Constitution, a county may "make and enforce within its limits all such local police, sanitary and other regulations *as are not in conflict with*

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[14] *See* Sagebrush Appendix, Exhibit C, *Verbatim Transcript of Proceedings on Motions to Certify Petitions, Certify Record and Strike Testimony*, at 47:20-25.

[15] *See* Sagebrush Appendix, Exhibit C, *Verbatim* Transcript *of Proceedings on Motions to Certify Petitions, Certify Record and Strike Testimony*, at 34-35.

general laws." (Emphasis added.) A local ordinance must yield to a state statute when it preempts the field. If the legislature "affirmatively expresses its intent, either to occupy the field or to accord concurrent jurisdiction, there is no room for doubt." *Lenci v. Seattle*, 63 Wn.2d 664, 670, 388 P.2d 926 (1964).

The legislature clearly expressed its preemption of the regulation and certification "of the location, construction, and operational conditions" of energy facilities to which RCW 80.50 applies. RCW 80.50.110(2) states:

> The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

This provision has long been understood as permitting the construction and operation of designated energy facilities at whatever location is specified in a site certification agreement even where provisions of county land use plans and regulations are to the contrary.[16] *See* 1 Op. Att'y Gen. 1977 at p. 9. This preemption of local law is reflected in other provisions of the siting law in which political subdivisions are bound by the state approval (RCW 80.50.120(1)) and where state certification is in lieu of any permits or certificates required by political subdivisions (RCW 80.50.120(3)).

[16] The legislative intent of the original 1970 statute, as reflected in Senate floor colloquies, was to require a proposed site to be consistent with the county land use. 1 Op. Att'y Gen. 1977 at p. 4. However, this approach was changed in a 1976 amendment examined in the Attorney General Opinion a short time after the amendment.

The preemption provision of RCW 80.50.110(2) specifies the object of the preemption: "energy facilities included under RCW 80.50.060 as now or hereafter amended." In turn, RCW 80.50.060(2) includes alternative energy facilities:

> The provisions of this chapter apply to the construction, reconstruction, or enlargement of a new or existing energy facility that exclusively uses alternative energy resources and chooses to receive certification under this chapter, regardless of the generating capacity of the project.

The statute plainly contemplates preemption of local land use ordinances for an energy facility that exclusively uses the alternative energy resources outlined in RCW 80.50.020(18), including wind power.

Kittitas County seeks to avoid the result of this plainly expressed preemption through a circuitous route of statutory interpretation that relies on multiple layers of definitions. County Br. at 18-28. This route leads to absurd results and what the County acknowledges is an "empty set." County Br. at 21. The simple answer to this argument is that the legislature stated that statutory definitions should not be used to defeat its obvious intent. RCW 80.50.020 provides: "The definitions in this section apply throughout this chapter *unless the context clearly requires otherwise*." (Emphasis added.) Obvious legislative intent is followed, even if statutory definitions could be used in some forced and overly literal manner to argue for a different meaning. *See State v. Morley*, 134 Wn.2d 588, 598, 952 P.2d 167 (1998) (statutory definitions "should not be blindly applied" when the statute says definitions apply "unless the

context clearly requires otherwise"); *accord Reynolds Metals Co. v. State*, 65 Wn.2d 882, 884-85, 400 P.2d 310 (1965). There is no basis for substituting a strained interpretation that is contrary to legislative intent.

C. The Growth Management Act Did Not Impliedly Repeal or Amend RCW 80.50

1. Rules of Statutory Construction Confirm the Legislature's Intent That EFSEC's Preemptive Authority Applies to GMA-Based Plans and Ordinances

The Petitioners argue that (1) the legislature, by providing that enactment of the facility siting law superseded other state laws "now in effect," also intended to declare in advance that any subsequent legislation would prevail over the law; (2) the GMA impliedly repealed the preemption mandate and authority in RCW 80.50, at least as it concerns local government decisions; (3) based on RCW 36.70A.103, EFSEC is required to comply with locally adopted GMA-based plans and development regulations; and (4) the GMA provisions related to "essential public facilities" compromise EFSEC's energy facility siting authority. These arguments disregard fundamental rules of statutory construction, all of which are directed at discerning the intent of the legislature.

First, Petitioners misconceive the meaning and purpose of RCW 80.50.110(1) when they argue that the legislature that enacted the facility siting law intended it to be impliedly repealed by future laws. ROKT/Lathrop Br. at 69. RCW 80.50.110(1) provides: "If any provision of this chapter is in conflict with any other provision, limitation, or

restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter." The obvious purpose of subsection (1) was to clarify any questions about legislative intent created by successive acts of the legislature. The legislature simply made plain its intent in enacting RCW 80.50: former state law was being superseded.[17]

Nor do the usual rules of statutory construction support Petitioners' position that the GMA impliedly repealed this preemption provision. Repeal by implication is strongly disfavored. *ATU Legislative Council of Wash. State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002). Such repeal will not be found where (1) there is no repealing clause or amendatory language in the subsequent statute, (2) where the statute claimed to be repealed is the more specific law, and (3) where the first statute has been subsequently amended in a way that shows the legislature deemed it still operative. Each of those elements is present here.

The GMA expressly amended numerous existing statutes. DCTED listed the statutes the legislature set forth and amended when it enacted the

[17] Naturally, it would be left to a future legislature to clearly state if any law it enacted was intended to supersede prior law. *See, e.g., United Milk Producers of Cal. v. Cecil*, 47 Cal. App. 2d 758, 118 P.2d 830, 834 (Cal. App. 1941) (observing a legislature "cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes" (quoting *Lewis' Sutherland Statutory Construction*, Vol. 1, § 224)).

GMA. *See* WAC 365-195-750. This enumeration does not contain any reference to RCW 80.50 or the state's energy facility siting authority. *Id.* "The legislature is presumed to be aware of its own enactments, and the court will presume that the legislature did not intend to repeal a statute impliedly if the legislature has provided an express list of statutes to be repealed." *ATU Legislative Council*, 145 Wn.2d at 552 (citations omitted). Further, a specific statute will prevail over a general statute, regardless of whether it was adopted before or after the general statute. If the subject matter of a general statute and a special act overlap, "the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment. If it was passed before the general statute, the special statute will be construed as remaining an exception to its terms, unless it is repealed by express words or by necessary implication." *Wark v. Washington Nat. Guard*, 87 Wn.2d 864, 867-868, 557 P.2d 844 (1977) (citations omitted); *see also State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003) (stating the most recently enacted provision prevails unless the first provision is more clear and explicit than the last); *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994) (more specific provision of utility law applied over general rate review authority).

Here, RCW 80.50.110(2) provides that the state preempts the siting of specified energy facilities. Authority over energy facility siting has been vested in the state since 1970, with preemption of local land use

plans and regulations confirmed since 1976. *See* 1975-76 Wash. Sess. Laws, 2d Ex. Sess., ch. 108, § 37(2) (codified at RCW 80.50.110(2)). The legislative intent in creating EFSEC was focused on ensuring "the location and operation of such facilities will produce minimal adverse effects on the environment," while providing for the state's energy needs, RCW 80.50.010, and sought to "avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay," RCW 80.50.010(5).

In contrast, the GMA covers the broad subject of land use planning. The GMA requires certain cities and counties to implement comprehensive plans addressing broad subject areas related to growth management. RCW 36.70A.040(3). The GMA does not contain any provisions requiring cities and counties to plan for and regulate energy facilities, nor does it purport to amend RCW 80.50. If it can be said the statutes are in conflict, then the specific energy facility siting law is an exception to the grant of local land use planning power under the GMA.

Petitioners also assert that RCW 36.70A.103 impliedly repealed RCW 80.50.110(2) and required EFSEC to allow siting of energy facilities only if the energy facility is in compliance with local comprehensive plans and development regulations. RCW 36.70A.103 provides:

> State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except

> as otherwise provided in RCW 71.09.250 (1) through (3), 71.09.342, and 72.09.333.[18]
>
> The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the state's authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW.

Petitioners' arguments rely on both paragraphs of this section. They read the phrase "[s]tate agencies shall comply" expansively to include any state agency exercising regulatory authority, and thereby generate the claimed conflict with RCW 80.50.110(2). Such an expansive reading is not warranted. A state agency is required to comply with these local land use provisions when a state agency is proposing to develop state facilities. This reading is the one set forth in DCTED rules, adopted pursuant to the GMA.[19] WAC 365-195-765(2) provides:

> The [D]epartment construes the provision for state agency compliance to require that each state agency must meet local siting and building requirements *when it occupies the position of an applicant* proposing development. . . . Generally this means that *the development of state facilities is subject to local approval* procedures and substantive provisions. (Emphasis added).

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[18] The referenced statutes relate to the construction of treatment and transition facilities for sex offenders.

[19] *See City of Des Moines v. Puget Sound Reg'l Council*, 98 Wn. App. 23, 32, n.4, 988 P.2d 27 (1999) (because the GMA directed DCTED to develop advisory regulations they are accorded some deference).

The legal and statutory context further suggests this section applies to proposed development by state agencies. The GMA was enacted at a time when significant questions remained about when and whether local land use controls applied to development of state facilities. *See, e.g., Snohomish Cy. v. State*, 97 Wn.2d 646, 649, 648 P.2d 430 (1982); *see also Everett v. Snohomish Cy.*, 112 Wn.2d 433, 440-41, 772 P.2d 992 (1989) (noting the legislature is "the body empowered to prescribe by statute the extent to which state facilities should be subject to local land use controls"). Additionally, references in this section to state facilities for sex offenders and the state's ability to site "essential public facilities" show the focus of RCW 36.70A.103 is development of facilities by the state. There is no indication the legislature intended an expansive meaning that would encompass the state's regulatory role.

Petitioners next contend that the "essential public facilities" element of RCW 36.70A.103 impliedly revoked EFSEC authority over any energy facilities the County considered an "essential public facility." ROKT/Lathrop Br. at 73-74. They point to the proviso stating that the amendments related to sex offender treatment facilities "do not affect the state's authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW." *Id.* at 73. This language, they claim, is a substantive provision extending GMA jurisdiction. However, a qualification in the nature of a proviso does not "enlarge the enactment to which it is appended so as to operate as

a substantive enactment itself . . . Rather, it is a restraint or limitation upon, *and not an addition to,* that which precedes it." *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 812, 982 P.2d 611 (1999) (footnote and internal quotations and citations omitted). Nothing in RCW 36.70A.103 provides a basis for an extension of the county's authority or a reduction in the scope of state preemption, even if one assumed that such a facility were considered an essential public facility.[20]

None of Petitioners' arguments can avoid the clear preemption of RCW 80.50.110(2). As DCTED stated in its GMA rule examining the relationship of the GMA to other laws: "Where the legislature has spoken expressly on the relationship of the act to other statutory provisions, the explicit legislative directions shall be carried out." WAC 365-195-705(1). Accordingly, plans and regulations adopted under the GMA "should accommodate situations *where the state has explicitly preempted all local land use regulations, as for example, in the siting of major energy facilities* under RCW 80.50.110." WAC 365-195-745(1) (emphasis added). The clear preemption language must be given effect.[21]

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[20] Nothing in the record indicates Kittitas County treated wind energy facilities as essential public facilities.

[21] In the 2006 session, as a "housekeeping" exercise, the legislature amended RCW 80.50.020(15) and (16), adding references to comprehensive plans and zoning ordinances adopted under the GMA. H.B. 2402, 59th Leg. (2006). This legislation made explicit what was the law before and after the enactment of the GMA, providing that like other state and local plans and regulations, GMA-based plans and zoning are subject to EFSEC's preemptive authority, as applied through RCW 80.50.090, 80.50.110, and 80.50.120. The Petitioners allege that H.B. 2402 does not apply in this case because the effective date of the bill was after Sagebrush filed its Application and also after Sagebrush filed its request for preemption. RCW 80.50 needed no change for EFSEC's

(continued . . .)

Another indication that the legislature intended EFSEC's power to coexist with the GMA is fact that the legislature has amended RCW 80.50 after the GMA was adopted, and after DCTED's 1993 adoption of these interpretive rules, without changes to the preemption provision of RCW 80.50.110(2). "Legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction." *Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993). The legislature has amended RCW 80.50 on a number of occasions since the adoption of the GMA. Indeed, the legislature added RCW 80.50.060(2), which allows alternative energy projects to seek EFSEC certification, some 10 years after the adoption of the GMA. 2001 Ch. 214, § 2. These actions make it abundantly clear that the legislature was aware of the provisions of the statute and their implications.

2. A Construction That the GMA Amended the Energy Facility Statute Would Lead to a Violation of Article II, Section 37, of the Washington Constitution

Petitioners' proposed construction of the GMA as impliedly amending RCW 80.50.110(2) would lead to constitutional infirmities. If the Petitioners are correct in their assertion that the GMA amended RCW 80.50, then such legislative action violated the Washington Constitution,

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preemptive authority to apply to Kittitas County's wind farm ordinance. The "vesting" doctrine protects builders from changing zoning law, and has no bearing in this setting. *See Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987).

Article II, section 37 ("No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."). A statute is an amendatory law if it amends authority delineated in a separate act without setting forth in full the provisions of the previous act. For example, in *Weyerhaeuser Co. v. King County*, 91 Wn.2d 721, 733, 592 P.2d 1108 (1979), because this new section of the Forest Practices Act did not set forth in full amended portions of the Shoreline Management Act ("SMA"), the court found that it violated Article II, section 37. This specific type of amendment was pointed to in a more recent opinion as "the kind of amendment of an existing statute which art. II, § 37 addresses." *ATU Union Local 587 v. State*, 142 Wn.2d 183, 252, 11 P.3d 762. If the GMA altered RCW 80.50.110(2) such that it should now read that the "state hereby does not preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060" then Article II, section 37 would require the statutory language to be set forth and altered in the way shown.[22]

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[22] In *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007), the Court confirmed that "local governments possess only those powers expressly delegated or found by necessary implication," and that "[w]here there is doubt as to the existence of a state power arguably conferred to a local government, this court will construe the question against the local government and against the claimed power." *Id.* at 699 (plurality opinion). The court held that the "policies and procedures of the SMA predated the GMA and were part of land use laws when the GMA was adopted in 1990." *Id.* at 700. "Although the GMA frequently mentions shoreline master programs, the GMA could not alter the provisions of the SMA without express amendment. . . . No such express amendments of the SMA were included in the GMA." *Id.* at 701.

D. EFSEC Appropriately Concluded All Requirements It Imposed by Rule for State Preemption Were Satisfied

EFSEC's former rule went beyond the processes required by the legislature and required an applicant to take the following steps to attempt to resolve local land use "inconsistency":

> As a condition necessary to continue processing the application, it shall be the responsibility of the applicant to make the necessary application for change in, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance.

Former WAC 463-28-030(1). These steps were an administratively imposed prerequisite to the exercise of state preemption. An applicant who sought the exercise of state preemption was required by former WAC 463-28-040 to address the following requirements:

> (1) That the applicant has demonstrated a good faith effort to resolve the noncompliance issues.
> (2) That the applicant and the local authorities are unable to reach an agreement which will resolve the issues.
> (3) That alternate locations which are within the same county and city have been reviewed and have been found unacceptable.
> (4) Interests of the state as delineated in RCW 80.50.010.

Sagebrush twice sought Kittitas County land use consistency. Its extensive efforts and each of the elements of WAC 463-28-040 are documented in the First and Second Requests for Preemption submitted to EFSEC. AR 3060-3094, 6585-6613. The very terms of the rule belie the concept that an applicant acting in good faith will always *succeed* in obtaining local land use consistency. What is required are reasonable, good-faith efforts at resolution before seeking preemption.

"Good faith" is a question of fact, which is reviewed to determine if substantial evidence supports a finding that a party acted in good faith. *See Van Horn v. Van De Wol, Inc.*, 6 Wn. App. 959, 961-962, 497 P.2d 252 (1972). The appellate court reviews an administrative determination regarding questions of fact under the substantial evidence standard. *Woods v. Kittitas County*, 162 Wn.2d 597, 616, 174 P.3d 25 (2007). Under this standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. *Id.* The appellate court views inferences in a light most favorable to the party that prevailed in the administrative forum exercising fact-finding authority. *Id.* at 617.

EFSEC conducted a lengthy adjudicative hearing at which it both heard and received voluminous testimony about the Applicant's good-faith efforts to obtain land use consistency from 2003 through 2006. AR 14268-69. Discussions in the course of the adjudicative hearing explored what would constitute "good faith" in attempting to resolve land use noncompliance issues. *See* Order 826, AR 14274; AR 15815-15816. In recommending preemption in Council Order No. 826, EFSEC indicated an applicant must work through local government land use processes to resolve inconsistencies, with compromises in position explored by both sides, but not to a point where further efforts would be futile. AR 14273. This view is an appropriate one in determining good faith in the context of local land use processes. *See Tacoma Northpark, L.L.C. v. NW, L.L.C.*, 123 Wn. App. 73, 96 P.3d 454 (2004) (finding substantial evidence

supported the trial court's finding that vendor made a good faith, albeit unsuccessful, effort to secure final plat approval).[23]

After careful review of the five-month chronology of the effort, at Order 826, AR 14277, EFSEC concluded:

> [T]he Applicant worked through local land use processes to resolve inconsistencies very extensively, providing detailed information, expert testimony, and timely responses to BOCC concerns, inquiries, and requests for updated documents. Further, the Applicant made compromises in the scope and scale of the proposed Project by reducing the number of turbines as well as adjusting their placement. In addition, the Applicant suggested a variety of measures to mitigate the potential impacts of shadow flicker on nearby residents. Finally, the Applicant compromised on the minimum setback of turbines from nonparticipating residences, moving from 1,000 feet to 1,320 feet. Even after the BOCC's preliminary denial, the Applicant continued its attempts to receive a definitive setback standard and fit its proposed Project within the BOCC's criteria. After reviewing the full record, the Council finds, 6-1, that the Applicant expended significant effort to navigate the County's permitting process and that these efforts to resolve the land use noncompliance issues were made in good faith.

Substantial evidence supports these findings. Two full-time Sagebrush staff members were assigned to work on the local land use consistency

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[23] Cases cited by Petitioners to define "good faith" are from an entirely different context. *State v. Smith*, 148 Wn.2d 122, 59 P.3d 74 (2002), and *State v. Ryan*, 103 Wn.2d 165, 172, 691 P.2d 197 (1984), involved hearsay admissions and the constitutional obligation to make a good-faith effort to obtain a witness's presence at trial. In each case no effort was made to obtain the victims' first-hand testimony, and the result was a finding that the state fell short of its good-faith duty to try to procure the witnesses.

review process. AR 12081. Sagebrush staff worked with the County to prepare the application materials and stayed in regular contact with County staff to respond to inquiries as they arose. AR 12860-61. At the Kittitas County Planning Commission's three-day land use consistency review hearing, Sagebrush brought its visual, noise, safety, property value, and habitat and wildlife analysts from distant locations to Kittitas County to address the Project and answer questions. AR 7229-7265; AR 7267. Additionally, there is no dispute about EFSEC's finding that Sagebrush "made compromises in the scope and scale of the proposed Project by reducing the number of turbines as well as adjusting their placement." AR 14277. Following expressions of concern about shadow flicker, Sagebrush offered to further reduce the productivity of the project by shutting down turbines during demonstrated periods of shadow flicker upon request of those affected.[24] AR 8275. Finally, EFSEC's finding that Sagebrush made good faith efforts by considering and compromising setback issues is fully supported by the record, as outlined in the Counterstatement of Facts above. See pgs. 9-11, *supra*. Even when, after five months of the process had passed, the Applicant was told by the BOCC at a hearing that it had 10 minutes to decide to increase its setback

[24] Petitioners ROKT and Lathrop are simply mistaken when they argue at page 47 of their Brief that Sagebrush withheld disclosure of the shadow-flicker shutdown technology, and overlook the offer to Kittitas County, in writing on April 25, 2006, to use the technology to address shadow flicker. AR 8275 – Horizon Wind Energy letter to Kittitas County Board of Commissioners at 4.

(to an undefined distance) or the County would "kill" the project, Sagebrush continued efforts to address setbacks. AR 13740-13747. It then proposed a 32 percent increase in setbacks in an April 25, 2006 letter. AR 8275. When these efforts resulted in an impasse, Chairman of the Board David Bowen acknowledged that "[Applicant's director] Mr. Taylor's comments regarding the time spent on this and the effort that's gone into this, everybody has taken this quite seriously and I appreciate those comments you made." AR 8171-8172.

Petitioners now try to diminish and denigrate these efforts, which included nine days of hearings over the course of five months and numerous meetings and exchanges of information. Petitioners claim that the information should have been provided in the form of a new development agreement that met unspecified criteria. The record shows that the form of the development agreement that the County desired and how it wished to receive pertinent information was the subject of ongoing confusion. Sagebrush sought guidance from the County regarding the form of development agreement it should use, and in light of the County's request to use the Wild Horse Wind Power Project ("WHWPP") Development Agreement as a template, submitted a draft development agreement to the County in October 2005. AR 6870, 6958-7170. It was then scolded for using WHWPP as a template. AR 1286, 8114-8115. Sagebrush drafted a new development agreement and submitted it to

Kittitas County on May 1, 2006. AR 7015-7170.[25] That development agreement was then criticized by the County for omitting or changing materials that were present in the WHWPP Development Agreement.[26] After relocating turbines away from residences and key public viewing areas[27] in the second application to the County, the Applicant was questioned on why it had moved the turbines and was told to consider another configuration. AR 6635, 12114. These efforts, further reducing the size and productivity of the project while losing years of time and experiencing rapidly inflating processing costs, all aimed at a second attempt to obtain land use consistency, are merely cast aside by ROKT and Lathrop as constituting "absolutely no interest in finding any level of compromise with Kittitas County." ROKT and Lathrop Br. at 46. They offer no explanation of why an applicant would not wish to resolve local land use inconsistencies and expedite the project.

Further, their claims that Sagebrush withdrew from substantive participation before the conclusion of the process, or that it failed to submit required materials including draft development agreement, ROKT and Lathrop Br. at 46, are refuted by the record. Sagebrush continued

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[25] "Two uncontroverted facts are present in this proceeding: ...(2) Applicant failed to submit required materials (i.e., draft Development Agreement)." ROKT Br. at 46.

[26] AR 8157 at 20-25; AR 8158 at 1-13; AR 8161 at 25; AR 8162 at 1-15, 24-25; AR 8163 at 1-13; AR 8164 at 7-16; AR 8166-67.

[27] AR 12080, 14286.

efforts to obtain land use consistency after the May 3, 2006, impasse at which "Sagebrush allegedly withdrew from substantive participation in Kittitas County review processes." AR 6629-6640. Kittitas County staff itself advised the BOCC of the parties' continued efforts at resolving the May 3, 2006, impasse, including in-person meetings (AR 8192-8196), a report to the EFSEC (AR 8197-8198), and an ongoing exchange of letters (AR 6629-6640).

Petitioners also contend EFSEC erred in its interpretation and application of its rule on evaluating alternate sites (WAC 463-28-040(3)). This claim is not supported by the record. Five elements are necessary for a wind site to be adequate for development: (a) adequate wind, (b) proximity to adequate transmission facilities, (c) large land area, (d) absence of significant environmental constraints, and (e) property owner interest and availability to access site. AR 12015-12016. Alternate locations were analyzed in the Draft EIS, as supplemented in the Draft Supplemental EIS ("DSEIS"), Ch. 2.7. AR 3860-3084. Wind meteorology expert Ron Nierenberg specifically discussed the strength of the KVWPP site in comparison to other sites in Kittitas County and concurred that there was a lack of other adequate sites available to Sagebrush. AR 16031-16032. EFSEC took notice of Kittitas County's zoning code, which would effectively require a repeat of the entire KVWPP process before it could be determined if any location in Kittitas County could in fact be an alternate site under the County's process. AR 14279-14280. As the Kittitas County Community Development Services

Director said for wind projects, the Wind Farm Resource Overlay Ordinance is a "kind of an all or nothing approval from the County." AR 15809, line 1. As interpreted by the County, if local land use consistency could not be obtained, there would be no avenue for a wind facility developer to seek permit approval from the state. Piercey Testimony at AR 15818, lines 12-25; 15809, lines 1-15.

EFSEC offered a concise review of all the factors that it took into consideration to support its interpretation of its own regulation, WAC 463-28-040(3), before making a finding that alternative sites were reviewed and found unacceptable. AR 14278-14280. Its finding on lack of alternate sites is supported by substantial evidence in the record and should not be disturbed.

Finally, ROKT and Lathrop offer their own evaluation of what is required to find that the state's interest can weigh in favor of preemption under WAC 463-24-040(4), questioning whether there has been a showing of the need for electrical power generation in this state for the foreseeable future. ROKT/Lathrop Br. at 67. The short answer to their questions is found in the testimony of the director of the state Energy Policy Division of DCTED, Tony Usibelli (AR 15956-16003), and former CEO of the Bonneville Power Administration, Randy Hardy (AR 16081-16089). Both described the power shortages Washington has already experienced and what the future portends: "Beginning in (sic) it's pretty clear that by 2010 and 2011 there will likely be a need for significant power on an overall basis. Individually, utilities may have needs much sooner than that." AR

15971. The need for immediate addition of power is further evidenced by the fact that every investor-owned utility had, by 2006, issued one or more "requests for proposals" for future power. Hardy Prefiled Testimony at AR 12880. The Governor, in her decision to approve this project, specifically balanced the need for affordable power with issues of human and land use compatibility. AR 11907-11908.

E. Kittitas County's SEPA Claims Are Substantively Unsupported

The County does not question that significant consideration was given to the "visual sensitivity" of landowners with residences adjacent to the project site. The impacts on the visual environment were evaluated and considered in extraordinary detail at every stage of the proceeding, including in the environmental review under SEPA. For example, the Final Environmental Impact Statement ("FEIS") notes that different types of viewers have different levels of sensitivity to changes in the visual landscape. AR 10065-10066. It lists "the principal types of viewers in the KVWPP area who have predictably high levels of sensitivity to visual impacts" with "[r]esident viewers" at the top of the list. *Id.* at 10066. "High levels of sensitivity were assigned to those cases where turbines would be potentially visible within 0.5 mile or less from residential properties" and "[m]oderate levels of sensitivity were assigned to areas where turbines would be visible from 0.5 mile to 5 miles within the primary 'view cone' of residences." *Id.* Nor does the County question the obvious conclusion anyone would draw from this assessment–that the

closer the residential viewer is to a turbine in the resident's primary view, the greater the visual sensitivity. However, the County appears to argue that in order to be adequate, the FEIS must actually conduct separate environmental analysis of mitigation measures. This view conflates the FEIS with the substantive SEPA authority exercised in the site certification decision.

After EFSEC reviewed the information from the SEPA process that resulted in the FEIS, it exercised its substantive SEPA authority under WAC 197-11-660(1)(a) to impose additional mitigation beyond that recommended in the FEIS. In so doing, EFSEC balanced the various public interests it is charged with considering by imposing conditions that reduce the impacts to the few nearby residences while providing affordable, renewable power to tens of thousands of households. To suggest that all adverse impacts must be eliminated under SEPA[28] invites the Court to rewrite RCW 43.21C so that it constitutes a substantive mandate on all agencies doing project review in this state, rather than use of SEPA as intended, a procedural evaluative tool in the process of exercising substantive authority.

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[28] It is firmly established in *Maranatha Mining v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) that "[t]he law does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible. *See also Cougar Mountain* ('SEPA seeks to achieve balance, restraint and control rather than to preclude all development whatsoever.')" (Citation omitted.)

Further, the County misrepresents the analysis of the FEIS and accuses EFSEC and the Governor of exclusively relying on "an expert hired by the applicant." County Br. at 40. While untrue, there is nothing unusual about an EIS relying in whole or in part on scientific and environmental information supplied by an applicant, particularly given the Petitioners' failure to present any alternative analysis or to rebut the analytical methodology of the SEPA responsible official. Further, SEPA supports this approach. WAC 197-11-420. The analysis of the Applicant's expert, Mr. Priestley, of the visual effects of the KVWPP, attached hereto as Sagebrush Appendix, Exhibit F, and which also appears at AR 12425-12565, is extensive and unprecedented in its depth and scope. The FEIS indicates that EFSEC's EIS consultants verified the information on visual impacts through site visits and use of additional written resources. AR 10065. Although the FEIS relies in part on the reports, testimony, and analysis of Mr. Priestley, it includes its own extensive independent analysis of the visual and aesthetic impacts of the project. AR 10067-10106. The FEIS summarizes this study methodology at AR 10065 – 66, attached as Sagebrush Appendix, Exhibit G. Petitioners have not met their burden of proof to overturn the FEIS.

This burden of proof and the standard of review is defined in *OPAL*, 128 Wn.2d at 875, as follows:

> The adequacy of an EIS is a question of law subject to de novo review. At the same time, [SEPA] provides that the decision of an agency regarding the adequacy of an EIS is to be "accorded substantial weight." RCW 42.21C.090.

> EIS adequacy involves the legal sufficiency of the data in the EIS. Sufficiency of the data is assessed under the "rule of reason," which requires a "reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision."

(Citations omitted.) Thus, under the rule of reason,[29] "the reviewing court must determine whether the environmental effects of the proposed action are sufficiently disclosed, discussed, and substantiated by supportive opinion and data." *Id.* at 644. The Court considers the adequacy of the environmental document under the clearly erroneous standard. The Court "does not substitute its judgment for that of the administrative body and may find the decision 'clearly erroneous' only when it is 'left with the definite and firm conviction that a mistake has been committed.'" *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988). In undertaking this review, the Court "examine[s] the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision." *Id.*

The analytical methodology and data supporting the FEIS are sound. The County ignores the record showing the unprecedented, site-specific evaluation of every single residence within 2,500 feet of proposed turbines and insists that an entirely subjective standard developed by the BOCC at the very end of its process preempts the determinations of

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[29] "The rule of reason is 'in large part a broad, flexible cost-effectiveness standard', in which the adequacy of an EIS is best determined 'on a case-by-case basis guided by all of the policy and factual considerations reasonably related to SEPA's terse directives' R. Settle § 14(a)(i), at 156, 155." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633, 860 P.2d 390 (1993).

EFSEC's SEPA responsible official.[30] The FEIS concludes with the following discussion of "significant unavoidable adverse impacts":

> Much of the public testimony and written comments received on the proposed project reflects that for many viewers, the presence of the wind turbines represents a significant unavoidable adverse impact because it significantly alters the appearance of the rural landscape over a large area of the Kittitas Valley. The constant flashing of lights on the tops of turbines would similarly be considered a significant unavoidable adverse impact. For purposes of this analysis, the term "significant" is defined as levels of visual impact that are rated to "moderately high" to "high" for many given viewpoints. Definition of the term "significant" in this context, however, is subjective and depends on many factors. For example, the degree to which the impacts are adverse depends on the viewer's location and sensitivity and the impact on view quality. In the final analysis, it is the comparative number of viewers most affected by the project that determines the overall impact. A project that significantly affects a smaller number of viewers may be offset by the fact that it may have a relatively low impact on a large number of viewers.

Sagebrush Appendix, Exhibit G, p. 3.9-46, AR 10107.

Although the FEIS concludes that for many viewers, the presence of the wind turbines represents a significant unavoidable adverse impact, the "significance" of the visual impact of the Project depends on the subjective opinions of individuals. *Id.* Site specific attention was given to the impacts on every residence. Moreover, EFSEC and the Governor are

[30] In 2004, the County made an effort to seize SEPA lead agency status from EFSEC. The Department of Ecology determined that this action violated SEPA. AR 3982-3984, 4008, 4024-4025.

authorized to balance the moderate impact to a small number of nonparticipating residences against the overwhelming statewide public benefit of the project.[31]

EFSEC detailed its compliance with SEPA from issuance of a Determination of Significance ("DS") on February 14, 2003, to issuance of the final EIS on February 1, 2007.[32] Its findings set forth the elements of the SEPA review devoted to analysis of "visual resources" and note the "scattered rural residential development" near KVWPP. Order 826, AR 14286-14288. The Council Order explains that in 2005, due to the Applicant's revision of the KVWPP layout, "relocating or reducing the length of various turbine strings, reducing the number of turbines, and eliminating others altogether," an addendum to the DEIS was prepared, which indicated that the overall visual impact of the revised project "would remain low to moderate." AR 14286. In addition, along US 97, the project's revised layout eliminated at least one area of high visual impact and reduced another "from high to low." *Id.* The Council Order then clarifies that despite the overall reduced visual impact of the revised project layout,

> a number of private residences would remain within one-half mile of the project's turbines. By definition (in the EIS analysis) any homes located within one-half mile have a high level of visual sensitivity to the turbines. However,

[31] WAC 197-11-448(1), 463-47-110; Order 826, AR 14258.

[32] AR 14257 at 7-8.

> "participating residences," those on private land being leased to the Applicants for placement of turbines, have voluntarily accepted the project's visual impacts. Thus, only the impacts of a smaller set of no more than sixteen (16) "non participating" residences require further specific review. Although the Council recognizes it is not obligated to eliminate all negative impacts on property owners, the Council nevertheless believes that determination of an appropriate methodology to mitigate visual impacts to private homes, particularly 'looming' (see below) is appropriate in this case.

EFSEC determined that a "blanket prohibition on the siting of all turbines within one-half mile of existing non-participating residences is unwarranted." AR 14286-14287. It observed that the Applicant had presented "expert testimony that a quarter-mile setback (1,320 feet) would be adequate to mitigate against any potential effect of a turbine visually dominating the view of a residence," noting that Mr. Priestley explained that studies of visual dominance "have established that an object ceases to dominate a person's normal field of view when seen from a distance of four times the height of the structure (4xh). (Record citations omitted)." AR 14287. Based on its independent environmental review of this analysis, EFSEC found that "for structures predominately defined by height rather than by width, such as wind turbines, the Applicant's proffered formula for determining the minimum distance necessary for preventing visual dominance (also known as 'looming') is appropriate." *Id.*

EFSEC made the following key determination, based on the authority in WAC 197-11-448:

> The Council further finds that siting individual wind turbines to remove any "looming" effect on non-participating residences in the immediate surrounding area sufficiently balances the impact on those homeowners with the public's interest in developing new sources of wind power. Therefore, the Council adopts criteria to eliminate any potential "looming" effects to be caused by any turbine in the Kittitas Valley Wind Power Project, to wit: no KVWPP turbine may be placed closer to any point of a non-participating residential structure than four times the turbine's tip height (4xh; i.e. for the proposed 1.5 MW turbines with tip heights of 330 feet, the required minimum setback from a non-participate residence will be 1,320 feet; for the proposed 3 MW turbines with tip heights of 410 feet, the minimum setback would 1,640 feet).

AR 14287-88. The setback condition is based on the only objective evidence, data, and testimony in the record (never rebutted by any party), utilizing the actual impact (height) of the wind turbine generators chosen. The conditions acknowledge the Applicant's measures to minimize impacts, and require further mitigation based on the actual attributes of the sparsely settled rural project area. The substantive conditions preserve project viability and the important public interests served by the Project while giving due consideration to the County's concerns. SEPA does not require an extensive environmental review of substantive conditions clearly imposed to minimize and mitigate impacts that are extensively identified and analyzed in an EIS.

The "environmental effects" of the "proposed action" are sufficiently disclosed, discussed, and substantiated by supportive opinion and data. *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn.2d 271, 286, 525 P.2d 774 (1974). Under the rule

of reason, the studies and analyses used for SEPA compliance purposes provide "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" to approve a "recommended course of action." *Citizens*, 122 Wn.2d at 644. EFSEC and Governor Gregoire are authorized to take into account the minimization of impacts proposed by the Applicant through project redesign and as a result of mandatory conditions, and they are within their authority to balance the relative impact on a small handful of residences against the extensive public benefit of the project. SEPA does not require the elimination of all impacts, and recognizes that some impacts are unavoidable.[33]

IV. CONCLUSION

EFSEC and the Governor concluded the KVWPP will supply affordable renewable energy while providing jobs and other economic benefits to the state, community and schools. They did so after a thorough and legally sound process. The Governor's decision to approve the Site Certification Agreement should be expeditiously affirmed.

[33] WAC 197-11-440(6)(c)(v); 197-11-448(1).

Respectfully submitted this 24th day of March, 2008.

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